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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4957

DATE COMPLAINT FILED: 1/3/00

DATE OF NOTIFICATION: 1/10/00

DATE ACTIVATED: 3/9/01

EXPIRATION OF STATUTE OF
LIMITATIONS: 11/21/04

COMPLAINANT: George D. Weber

RESPONDENTS: Buchanan Reform, Inc. and Angela M. Buchanan, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 441d
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: Buchanan Reform, Inc.

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

The matter arose from a complaint filed by George D. Weber ("Complainant") alleging that Buchanan Reform, Inc., ("the Committee") and Angela M. Buchanan, as treasurer (collectively "Respondents"), violated provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") in connection with an electronic mail solicitation of contributions that allegedly did not contain a disclaimer. Respondents were notified of the complaint on January 10, 2000, and a response was received. On March 28, 2000, the complainant filed supplemental information concerning a second e-mail solicitation by Buchanan Reform, Inc.; this information was also supplied to the Committee.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

Pursuant to 2 U.S.C. § 441d(a)(1) and 11 C.F.R. § 110.11(a)(1), whenever the authorized committee of a candidate, or its agent, pays for communications expressly advocating the election or defeat of a clearly identified federal candidate, or soliciting any contribution, through any broadcasting station, newspaper, direct mailing, or other type of general public advertising, such communications must contain disclaimers that "shall clearly state that the communication has been paid for by such authorized political committee"

A disclaimer notice must be clearly and conspicuously displayed. 11 C.F.R. § 110.11(a)(5). It need not appear on the first page of a communication, assuming there is more than one page. 11 C.F.R. § 110.11(a)(5)(i). If, however, the contents of a communication consist of several pieces that can be distributed separately, each such component must carry a disclaimer. 11 C.F.R. § 110.1(a)(5)(ii).

The Commission has determined that sites on the World Wide Web constitute general public political advertising for purposes of 2 U.S.C. § 441d and 11 C.F.R. § 110.11, and thus express advocacy communications or solicitations for contributions made over the web require disclaimers. Advisory Opinion 1995-9. With regard to a requirement of disclaimers on electronic mail ("e-mail") messages, the Commission included this issue in its Notice of Inquiry and Request for Comments dated November 5, 1999 pertaining to the formulation of regulations governing the use of the Internet in federal campaigns. The Commission solicited comments "on whether there are circumstances in which the disclaimer requirement should apply to electronic mail," and, more specifically, on "whether list serves or other forms of electronic mail that are distributed to large numbers of recipients in bulk should be regarded as general public political advertisements for

which a disclaimer is required." 64 Fed. Reg. 60,360, 60,367-8 (1999). The issue of electronic mail disclaimers was not included in the more recent Notice of Proposed Rulemaking entitled "The Internet and Federal Elections: Candidate-Related Material on Web Sites of Individuals, Corporations and Labor Organizations," 66 Fed. Reg. 50,358 (2001). Thus, the Commission's regulations at present do not address the issue of e-mail-related disclaimers.

B. Complaint

The Complainant originally alleged that respondents Buchanan Reform, Inc. and Angela M. Buchanan violated the Act when they solicited a \$25-\$50 contribution from the complainant by means of an e-mail message that lacked a proper disclaimer notice. The e-mail communication stated that it was from pat@gopatgo2000.org, but no disclaimer appeared. The complainant had received the message on November 21, 1999. This message requested a contribution for "Buchanan Reform" and directed contributors to "click on the link below to our web site" It is not clear from the copy of the message attached to the complaint that a hyperlink was in fact provided in that the apparently intended hyperlink is not underlined; however, the "gopatgo2000" web site address was spelled out. (See Attachment 1).

Later, the Commission received supplemental information from the complainant that included a second e-mail communication from "pjb@buchananreform.com (Patrick J. Buchanan)." This latter communication carried as its subject line "A special message from Patrick J. Buchanan," and stated in the body: "What we need today is a financial contribution from you to immediately begin a highly targeted advertising outreach program to voters for whom campaign reform is a key issue. . . . Please try to help with a contribution now by following the link below." A hyperlink was indicated by the words "Click here." This e-mail message also did not include a disclaimer. (See Attachment 2).

Attached to the complaint was a copy of Chapter 11 of the Commission's 1999 Campaign Guide for Congressional Candidates and Committees. The complainant had circled the sub-heading, "Fundraising on the Internet," that was followed by:

Campaign committees may solicit contributions over the Internet (considered a form of public political advertising) as long as the solicitation:

Includes the proper disclaimer
Requests contributor information.

C. Response

The response submitted by counsel for the Committee on January 27, 2000 stated:

The e-mail letter submitted with Mr. Weber's [original] complaint is the first page of a two-page solicitation, the second page of which contains the appropriate disclaimer. The recipient of the e-mail solicitation cannot make a contribution without first viewing the second page. To make a contribution, the recipient is instructed to activate a link provided in the first page (<http://www.gopatgo2000.com/contribute>), which then displays the second page of the solicitation. The second page is attached.

The attachment to the response to which counsel referred, (See Attachment 3), consisted of a document that in hard copy is two pages in length. The first page is a contribution form from a web site with the address www.buchananreform.com. The second page contains the following disclaimer language: "This web site is paid for by: Buchanan Reform Angela 'Bay' Buchanan Treasurer." Counsel asserted that the disclaimer on this Committee web site page to which readers of the e-mail communication were directed met the requirements of the Commission's regulations, which do not require a disclaimer on each page, or the front page, of a multi-page communication.

Counsel has not responded to the supplemental information submitted by the complainant in March, 2000.¹

There is no information in either the complaint or the response about the costs associated with either of the two e-mail communications at issue.

D. Analysis

This Office believes that, in the hyperlinked e-mail/Internet web site context, an e-mail document should be considered to constitute one communication and any document reachable via a hyperlink to constitute a separate communication. Section 110.11(a)(5)(ii) of the Commission's regulations requires that separable parts of a communication each contain their own disclaimer. Viewers/recipients of an e-mail communication may elect not to go on to a linked web site in order to obtain additional information or to make contributions, underlining the separateness of the two communications and making it necessary that the initial e-mail communication stand by itself in terms of a disclaimer. Moreover, not all e-mail systems permit "clicking" to an Internet web site; there are individuals with e-mail addresses who do not have unfettered Internet access. Thus, an e-mail document and a hyperlinked web site may be even more separable than two paper communications in that the recipient of an e-mail communication may or may not have access to the linked document, or may elect not to utilize a link that does exist and thus never see a disclaimer. Given this degree of separateness, if an initial e-mail communication contains a solicitation and/or

¹ Although Respondents have not actively asserted that the hyperlink in the second e-mail was to the same web site page as that assertedly linked to the first e-mail, presumably they would apply the same argument to the second e-mail communication at issue.

express advocacy, it should be required to carry a disclaimer of its own. See 2 USC § 441d.²

In addition, 11 C.F.R. § 110.11(a)(5) requires that disclaimers be clear and conspicuous. Disclaimers are not clear and conspicuous if they can be easily overlooked. Again, if it is necessary to go to a linked web site for a disclaimer, such a disclaimer can be easily overlooked, especially if the hyperlink is not used at all.

Both of the e-mail communications here at issue contained solicitations of contributions. The first requested a contribution for "Buchanan Reform," while the second requested "a financial contribution" for a particular campaign program. Therefore, there should have been disclaimers on each of these communications, notwithstanding hyperlinks to a web site containing a disclaimer. By not including disclaimers on the e-mails, Buchanan Reform Inc. and its treasurer appear to have violated 2 U.S.C. § 441d.

This Office recommends that the Commission find reason to believe that Buchanan Reform Inc. and Angela M. Buchanan, as treasurer, violated 2 U.S.C. § 441d. Notwithstanding this recommendation, the Office recognizes that the costs of the e-mail communications at issue are not known and that they could have been minimal and that the committee made some attempt to comply with the disclaimer requirements of the Act by including a disclaimer on the contribution form reached through the hyperlinks. Therefore, as a matter of prosecutorial discretion this Office also

² Moreover, in MUR 4340, where the web site of a candidate's closely held corporation contained a hyperlink to the candidate's committee's web page and also referred its readers to the committee's web site where contributions were solicited, the Commission entered into a conciliation agreement with both the corporation and the authorized committee that addressed violations of 2 U.S.C. § 441d(a) by both respondents as a result of the lack of a disclaimer on each of their respective web sites. Although the Commission's reasoning with respect to other issues in the case has since evolved, *see* Advisory Opinion 1999-17 and proposed 11 C.F.R. § 117.2 (hyperlinks from corporate or labor organization web sites to candidate or committee web sites considered contributions or expenditures only under enumerated circumstances), its conclusion as to the need for a disclaimer remains undisturbed.

recommends that the Commission take no further action, send a letter of admonishment, and close the file.

III. RECOMMENDATIONS

1. Find reason to believe that Buchanan Reform Inc. and Angela M. Buchanan, as treasurer, violated 2 U.S.C. § 441d, take no further action and send a letter of admonishment.
2. Approve the appropriate letter.
3. Close the file.

Lawrence H. Norton
General Counsel

7/3/02
Date

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Attachments:

1. E-mail solicitation dated November 21, 1999
2. E-mail solicitation dated March 23, 2000
3. Web site link